No. 3105

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN CENTRAL INSURANCE COMPANY, NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, INSURANCE COMPANY OF NORTH AMERICA, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURG, PA., SECURITY INSURANCE COMPANY OF NEW HAVEN,

Appellants,

vs.

DAVID ISAACS,

Appellee.

APPELLANTS' MEMORANDUM AS TO APPELLEE'S "SUPPLEMENTAL BRIEF".

JESSE OLNEY,
Solicitor and Counsel for Appellants.

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The record before your Honors reeks with fraud.

This trustee under the shrewd pilotage of his astute counsel is attempting to navigate this fraud safely through the rapids of this litigation. To this end nowhere in either of his briefs does he even refer to the load of fraud he is carrying or even make a pretense of answering a single charge of fraud in our brief or attempt to explain away this record bristling with the badges of his fraud on every page.

His frauds stand shamelessly naked and brazenly undenied before your Honors.

Now, with an effrontery almost unbelievable, he demands his flimsy technicalities shall be recognized; that everything else shall be cast aside; and that your Honors as Chancellors shall say—"The record convicts you of unconscionable frauds but equity has no remedy." No Court of Equity will do this; nor will equity aid a trustee who has assumed a position with reference to the trust fund which is antagonistic to his beneficiary (Appellants' Brief, pp. 255, 256).

I find a "Supplemental Brief" has been now filed by our trustee in an eleventh hour attempt to strengthen the weakness of his first pamphlet; and in the bolstering up process the dubious expedient of auto-suggestion is employed by continual references to the "agency" of Main, the adjuster. Counsel parades with much ostentation the elementary doctrine that a principal may ratify the unauthorized act of his agent:—thus overstepping, however, in his zeal, the major premise that before there can be any "unauthorized act of an agent", an "agency" must first be affirmatively proved to exist.

Further, also, of course, the "unauthorized act of an agent" must be an act at least within the extent of his "agency". In short he must be able to do some acts under it to permit a particular act to become "an unauthorized act".

The cases cited by counsel are at law wherein there was a total absence of fraud and no fiduciary relation,

and are not of equitable cognizance. They evidently arose in Justices Court as one is for a small balance on promissory note and another for $55 on stated account.

The reason why your Honors should be asked to assist this trustee in a Federal equity suit by reason of such citations from law cases wherein the fiduciary relation and fraud are absent, is too obscure to be observed by ordinary mental vision.

Especially is this so in view of the equitable rule—seemingly unknown to opposing counsel—that one cannot claim the benefit of any contractual relation in agency while committing a tort (Appellants' Brief, p. 218).

The courteous and astute counsel's specious attempt to camouflage his client's fraud beyond your Honors' observation by employing the elementary doctrine of rescission of contract and the broad general rule of "agency" that a principal who accepts the act of one professing to act for him must adopt it in toto and will not be permitted to claim the benefit arising therefrom and at the same time repudiate the burden thereof, is commendable in zeal but unfortunate in application. This abstract proposition is of course unassailable but how does it apply here to the cause at bar?

This is not a case of rescission of contract. There is no rescission. There is but one cause of action pleaded and that is to require this defendant Isaacs to account fully for the property of the complainants which came into his hands (Appellants' Brief, p. 254).

They say we are rescinding the contract. We are not. We are affirming it. We are holding Isaacs very strictly to a full and true accounting under his contract, viz., to honestly sell our merchandise to the best possible advantage and for the best price possible without fraud, without concealment or misrepresentation, and without secret personal advantage or profit.

They say to do this we should return to our worthy trustee the $1049.81 he paid us claiming that was all the balance he owed.

They admit we are entitled to that $1049.81, so why return it when they themselves admit we are entitled to it? Nor do they deny we are fairly entitled to more, for their silence in regard to the frauds in depreciating the proceeds (especially the depreciation of the second inventory) is an admission.

If we are successful before your Honors—as certainly the record entitles us to be—we shall then get more. If we are unsuccessful, we still retain the amount which this trustee says we are entitled to.

Counsel seems throughout in his citation of authorities to have had some other case in mind rather than the one at bar.

The doctrine is so elementary its concise statement on pages 147 and 148 of Appellants' Brief seems quite sufficient.

Dated, San Francisco,
March 16, 1918.

JESSE OLNEY,
Solicitor and Counsel for Appellants.